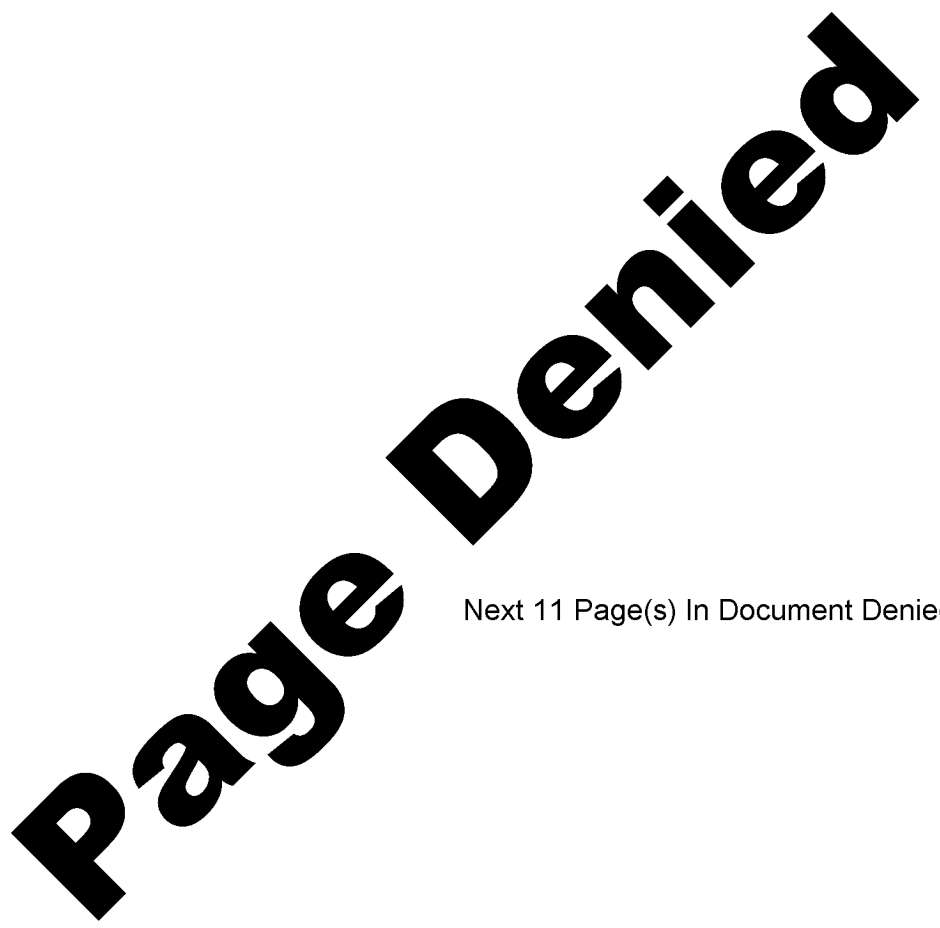


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OCA 88-2273
6 July 1988

MEMORANDUM FOR: The Director

FROM: John L. Helgerson
Director of Congressional Affairs

SUBJECT: Additional Item for your breakfast with the House Foreign Affairs Committee

1. At the insistence of the House Foreign Affairs Committee staff, this afternoon we picked up a draft copy of the Committee's report on H.R. 3822, the Stokes Bill on Oversight Legislation. We have attached a copy of the draft report which might be worth a few minutes of your time to review before your breakfast tomorrow with the Foreign Affairs Committee.

2. Predictably the report takes the opportunity to address the often heard complaint that even though the Foreign Affairs Committee has jurisdiction over the consideration of foreign policy matters, the Committee is not adequately informed on covert action activities in support of U.S. foreign policy. The report contends that both House rules and Hughes-Ryan specifically include the Foreign Affairs Committee as one of the committees which should be informed in a timely fashion as to a description and scope of the covert activity.

3. On the page of the report identified as 19A (see clip) the Committee says that it expects and understands that the HPSCI will consult with Members of the Foreign Affairs Committee about the policy objectives and national security of the United States in accordance with the rules of the House. In order to enhance communication and information sharing between the two Committees, "the Committee will, in cooperation with the Select Committee, propose the establishment of a formal intercommittee group which would be tasked to ensure that all appropriate information relevant to the conduct of U.S. foreign policy in the posession of the Select Committee be made available to the Committee on Foreign Affairs."

4. In your testimony before the Foreign Affairs Committee on the Stokes Bill, you said that the Foreign Affairs Committee has a legitimate need for intelligence

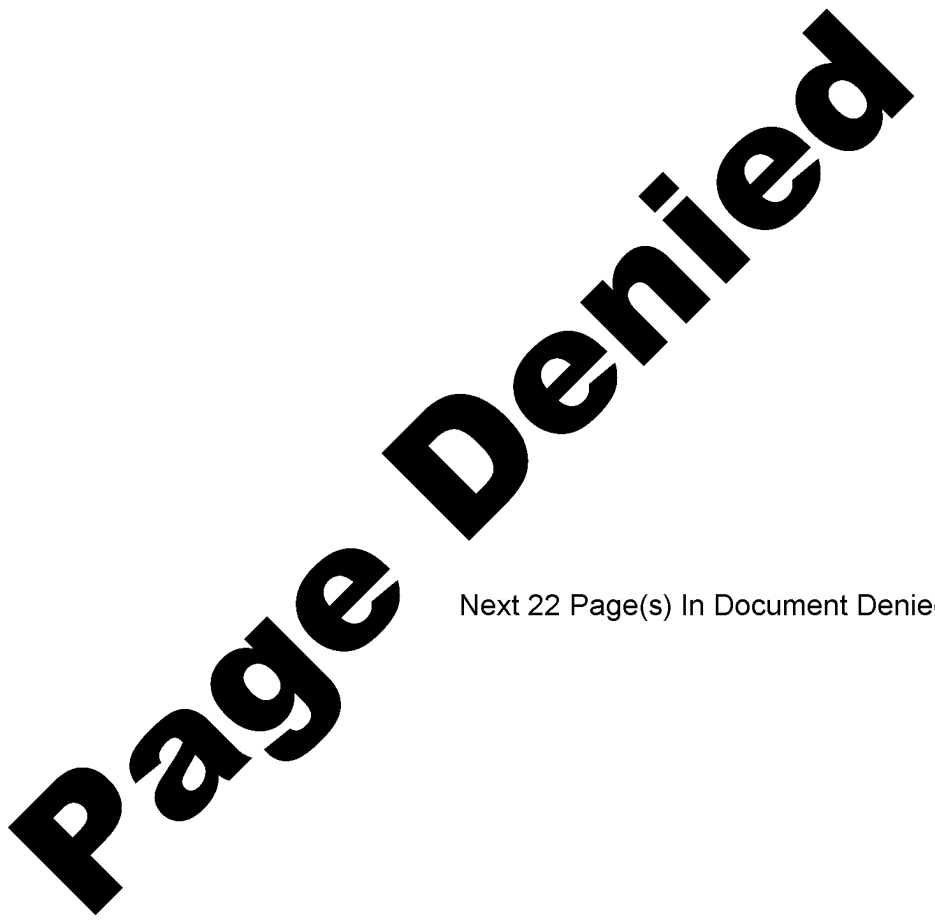
UNCLASSIFIED

information. You can agree that the Committee should have access to information to ensure that no covert action is undertaken which would be inconsistent with foreign policy objectives, but the mechanism established to ensure that this exchange between two committees of Congress takes place is the responsibility of the House leadership, not the Director of the Central Intelligence Agency.

John L. Helgerson

Attachment:
As stated

STAT

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10 May 1988

The Honorable Louis Stokes
Chairman
House Permanent Select Committee on Intelligence
U.S. House of Representatives
U.S. Capitol, Room H-405
Washington, D.C. 20515-6415

Dear Mr. Chairman,

As your Committee well knows, intelligence activities are not easy for an open, democratic society to conduct effectively; and for a society such as ours, covert action operations are particularly difficult.

The troublesome, complex issues they inevitably raise lead some to argue that the United States should eschew or abandon covert action operations altogether. In a perfect world, this might be desirable; but in the world in which we have no choice but to live, it would be folly. All of the undersigned endorse the conclusion of the Congressional committees investigating the Iran-Contra affair that (in their Report's words) "Covert operations are a necessary component of our Nation's foreign policy".

Current legislation covering such matters -- e.g., Section 501 of the National Security Act of 1947, as amended -- has a measure of flexibility and creative ambiguity that some find distressing and which certainly can be abused, but which is nonetheless essential in any statute dealing with a subject as complex and important as covert action. To prevent what are perceived as Iran-Contra abuses from recurring, the oversight bill your distinguished Committee is now considering -- H.R. 3822 -- would erase that ambiguity and virtually eliminate that flexibility.

Specifically, H.R. 3822 would strike the "in timely fashion" covert action notification provision of the National Security Act of 1947's current Section 501 and substitute two inflexible 48 hour requirements.

(1) Any Presidential determination that a given "special activity ... is necessary to support [U.S.] foreign policy objectives and is important to the national security of the United States" would have to "be reduced to a written finding as soon as possible but in no event more than forty-eight hours after the decision

is made". Furthermore, a copy of each such finding, signed by the President, would have to be provided to the chairmen of each of the two Congressional oversight committees.

(2) Notice of each such "special activity" would have to be given to, at a minimum, the chairmen and ranking minority members of the two intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate -- eight specific individuals -- "as soon as possible but in no event later than forty-eight hours after the special activity [in question] has been authorized."

With respect to Congressional notification, H.R. 3822's proposed solutions to what are perceived as current problems would create new ones of at least equal gravity.

At one level, translating a Presidential determination into a written finding -- properly drafted, staffed, co-ordinated and signed -- within 48 hours would be virtually impossible if the decision in question had to be made over a holiday and/or when the President was out of Washington, for whatever reason. Notifying even the eight designated Congressional leaders within 48 hours after a Presidential authorization decision was made could be equally difficult if, at the time in question, Congress was out of session and the eight Congressional leaders involved were scattered all over the country, or the globe.

H.R. 3822 does say that in circumstances "where time is of the essence", the President may initiate a special activity before notice is given, even to the Congressional leadership; but the modest flexibility thus countenanced is largely illusory. H.R. 3822's forty-eight hour clock begins running at the moment the special activity in question is authorized. The drafters of H.R. 3822 seem to have ignored or forgotten that there is almost invariably a lapse of at least 48 hours between the authorization, in Washington, of a given special activity and its initiation in some distant foreign land.

Had H.R. 3822 been on the statute books in 1980 -- to cite but one example of the kind of problems the language of its

Congressional notification provisions would create -- President Carter could not lawfully have enlisted the Canadian assistance that was essential to the successful exfiltration from Iran of the six American escapees from our seized Tehran embassy. Canada provided that assistance on the express condition that Congress not be notified while the operation in question was in progress, and the duration of that "special activity" was measured in weeks -- not hours.

All of the undersigned have had extensive personal experience in dealing with the concrete, practical problems faced by an open, democratic society endeavoring to conduct effective covert action. Several of us have testified, individually, on these matters before your Committee, in connection with this very legislation. With respect to covert action, we have some conceptual differences, and many disagreements over details; but on the following considerations and recommendations we are unanimous.

Particularly where matters as complex as covert action are involved, even the most astute, discerning legislators and staff drafters of legislation can not possibly forsee or codify with precision, in advance, all the concrete contingencies and difficult real life dilemmas that are bound to arise. If H.R. 3822, with its rigid, inflexible notification provisions, should become law in its present form, there is no way of telling what future President's hands that law may tie, under what particular circumstances, with what adverse impact on U.S. interests -- in ways likely to be rued by future Congresses as well as by future Presidents, regardless of party.

Most respectfully, Mr. Chairman, we urge that you and your distinguished Committee carefully weigh the advisability and risks of enacting covert action oversight legislation amid the mounting, inevitably partisan pressures of a Presidential and Congressional election year. If you and a majority of your colleagues feel that such legislation truly needs to be enacted in 1988, we urge that any bill endorsed by your Committee not contain inflexible notification requirements which an administration, of whatever party, would be required by law to follow, under any and all circumstances, within a narrow time

frame rigidly denominated in numerically specified hours, or even days.

Sincerely,

Zbigniew Brzezinski

George A. Carver, Jr.

William E. Colby

Richard Helms

Henry A. Kissinger

General Brent Scrowcroft

GAC/kg

cc: The Honorable Henry Hyde
Ranking Minority Member
House Permanent Select Committee on Intelligence

THE WHITE HOUSE

WASHINGTON

August 7, 1987

Dear Chairman Boren:

In my March 31, 1987, message to Congress, I reported on those steps I had taken and intended to take to implement the recommendations of the President's Special Review Board. These included a comprehensive review of Executive Branch procedures concerning presidential approval and notification to Congress of covert action programs -- or so-called special activities. In my message, I noted that the reforms and changes I had made and would make "are evidence of my determination to return to proper procedures including consultation with the Congress."

In this regard, Frank Carlucci has presented to me the suggestions developed by the Senate Select Committee on Intelligence for improving these procedures. I welcome these constructive suggestions for the development of a more positive partnership between the intelligence committees and the Executive Branch.

Greater cooperation in this critical area will be of substantial benefit to our country, and I pledge to work with you and the members of the two committees to achieve it. We all benefit when we have an opportunity to confer in advance about important decisions affecting our national security.

Specifically, I want to express my support for the following key concepts recommended by the Committee:

1. Except in cases of extreme emergency, all national security "Findings" should be in writing. If an oral directive is necessary, a record should be made contemporaneously and the Finding reduced to writing and signed by the President as soon as possible, but in no event more than two working days thereafter. All Findings will be made available to members of the National Security Council (NSC).

2. No Finding should retroactively authorize or sanction a special activity.

3. If the President directs any agency or persons outside of the CIA or traditional intelligence agencies to conduct a special activity, all applicable procedures for approval of a Finding and notification to Congress shall apply to such agency or persons.

4. The intelligence committees should be appropriately informed of participation of any government agencies, private parties, or other countries involved in assisting with special activities.

5. There should be a regular and periodic review of all ongoing special activities both by the intelligence committees and by the NSC. This review should be made to determine whether each such activity is continuing to serve the purpose for which it was instituted. Findings should terminate or "sunset" at periodic intervals unless the President, by appropriate action, continues them in force.

6. I believe we cannot conduct an effective program of special activities without the cooperation and support of Congress. Effective consultation with the intelligence committees is essential, and I am determined to ensure that these committees can discharge their statutory responsibilities in this area. In all but the most exceptional circumstances, timely notification to Congress under Section 501(b) of the National Security Act of 1947, as amended, will not be delayed beyond two working days of the initiation of

a special activity. While I believe that the current statutory framework is adequate, new Executive Branch procedures nevertheless are desirable to ensure that the spirit of the law is fully implemented. Accordingly, I have directed my staff to draft for my signature executive documents to implement appropriately the principles set forth in this letter.

While the President must retain the flexibility as Commander-in-Chief and Chief Executive to exercise those constitutional authorities necessary to safeguard the nation and its citizens, maximum consultation and notification is and will be the firm policy of this Administration.

Sincerely,

Ronald Reagan

cc: The Honorable Louis Stokes
The Honorable Henry J. Hyde

The Honorable David L. Boren
Chairman
Senate Select Committee on Intelligence
United States Senate
Washington, D.C. 20510

# I. INTRODUCTION

## A. The Policy Context

In discharging his constitutional responsibility for the conduct of foreign relations and for ensuring the security of the United States, the President may find it necessary that activities conducted in support of national foreign policy objectives abroad be planned and executed so that the role of the United States Government is not apparent or acknowledged publicly. Such activities, the failure or exposure of which may entail high costs, must be conducted only after the President reaches an informed judgment regarding their utility in particular circumstances. To the extent possible, they should be conducted only when we are confident that, if they are revealed, the American public would find them sensible.

This Directive... sets forth revised procedures for presidential approval and review, through the National Security Council (NSC) process, of all "special activities" as defined by section 3.4(h) of Executive Order No. 12333 (December 4, 1981).

These procedures are designed, inter alia, (1) to ensure that all special activities conducted by, or at the direction of, the United States are consistent with national defense and foreign policies and applicable law; (2) to provide standards ensuring the secrecy of such activities even when the results become publicly known or the activities themselves are the subject of unauthorized disclosure; and (3) to implement section 501 of the National Security Act of 1947, as amended (50 U.S.C. 413), concerning notification to Congress of such activities.

## B. The Role of the Assistant to the President for National Security Affairs and the National Security Council Staff

Within the framework and in accordance with the requirements set forth in NSDD 266, the Assistant to the President for National Security Affairs (the "National Security Advisor") shall serve as manager of the NSC process and as principal advisor on the President's staff with respect to all national security affairs, including special activities. The NSC staff, through the Executive Secretary of the NSC, shall assist the National Security Advisor in discharging these responsibilities. The National Security Advisor and the NSC staff themselves shall not undertake the conduct of special activities.



Extract from NSDD 286

## A. Presidential Findings and Memoranda of Notification

### 1. Presidential Findings

In all cases, special activities of the Central Intelligence Agency (CIA) in foreign countries require, under the terms of section 662 of the Foreign Assistance Act of 1961, as amended (22 U.S.C. 2422), Findings by the President that such activities are important to the national security of the United States. Presidential Findings shall be obtained with respect to all CIA activities abroad, other than those activities that are intended solely for obtaining necessary intelligence within the meaning of section 662 of the Foreign Assistance Act of 1961, as amended.

No special activity may be conducted except under the authority of, and subsequent to, a Finding by the President that such activity is important to the national security of the United States. In all but the rarest of circumstances, no special activity may be undertaken prior to the President's having signed a written Finding. In cases in which the President determines that time is of the essence and that the national security requires that a special activity be undertaken before a written Finding can be presented for signature, and that oral authorization therefore is required, ...a contemporaneous record of the President's authorization shall be made in writing, and... a corresponding Finding shall be submitted for signature by the President as soon as possible, but in no event more than two working days thereafter. No Finding may retroactively authorize or sanction a special activity.

### 2. Memoranda of Notification

In the event of any proposal to change substantially the means of implementation of, or the level of resources, assets, or activity under, a Finding; or in the event of any significant change in the operational conditions, country or countries significantly engaged, or risks associated with a special activity, a written Memorandum of Notification (MON) shall be submitted to the President for his approval. All actions to be authorized by means of an MON must be important to U.S. national security as set forth in a previously-approved Finding. An MON also shall be submitted to the President for his approval in order to modify a Finding in light of changed circumstances or passage of time; or to cancel a Finding because the special activity authorized has been completed or for any other reason.

The procedures for approval by the President of an MON shall be the same as those established by this Directive for approval of a Finding.

Each Finding and MON submitted to the President for approval shall be accompanied by or include a statement setting forth, inter alia, the following:

(a) the policy objectives the special activity is intended to serve and the goals to be achieved thereby;

(b) the actions authorized, resources required, and Executive departments, agencies, and entities authorized to fund or otherwise participate significantly in the conduct of such special activity;

(c) consistent with the protection of intelligence sources and methods, whether it is anticipated that private individuals or organizations will be instrumental in the conduct of the special activity;

(d) consistent with the protection of intelligence sources and methods, whether it is anticipated that a foreign government or element thereof will participate significantly in the special activity; and

(e) an assessment of the risks associated with the activity.

B. NSC Review of Proposals for Special Activities

Prior to its submission to the President, each proposed Finding and MON shall be reviewed within the NSC process as provided below. The results of such review shall be submitted to the President prior to his determination with regard to each proposed Finding or MON.

1. The National Security Planning Group

Each proposed Finding and MON shall be reviewed by the National Security Planning Group (NSPG), a committee of the NSC... The National Security Advisor shall be responsible for the agenda and conduct of such meetings, at the President's direction. Unless exceptional circumstances dictate otherwise, the National Security Advisor shall circulate the agenda for, and papers to be considered at, NSPG meetings four (4) days in advance thereof.

NSPG members shall review each proposed Finding and MON; their comments, recommendations, and dissents, if any, shall be provided to the President orally, or in writing through the National Security Advisor. The National Security Advisor shall transmit all proposed Findings and MONs to the President through the Chief of Staff to the President. Each proposed Finding and MON shall be coordinated, in advance of its submission to the President, by the NSC Legal Advisor with the Counsel to the President. Under normal circumstances, the NSPG will meet to review each Finding or MON prior to presidential approval.

of the NSPG members' comments communicated other than in a formal NSPG meeting. The National Security Advisor shall ensure that an appropriate record is made of the President's consultations with NSPG members however conducted, and that the President's decision is committed to writing. The National Security Advisor shall notify all NSPG members in writing of the President's decision with regard to each proposed Finding and MON...

C. Periodic NSC Review of Special Activities

Not less often than once each calendar year, the NSPG shall review each special activity, and recommend to the President those Findings to be reaffirmed, revised, or terminated. Unless, within thirty (30) days following the conclusion of such review, the President approves in writing the continuation of a Finding, or otherwise directs, such Finding and associated MONs, if any, together with the authority to undertake special activities thereunder, shall be deemed cancelled upon appropriate notice to the DCI or head of such other Executive department, agency, or entity authorized to conduct the special activity. The National Security Advisor shall provide a written report of the results of this review to NSPG members. The Director of the Office of Management and Budget shall ensure that the President's budget provides resources consistent with all Findings for the congressional budget request.

D. Executive Secretary of the NSC

The Executive Secretary of the NSC and the NSC staff shall assist the National Security Advisor and Deputy National Security Advisor with appropriate preparations for, and follow-up to, all... meetings relating to special activities. Such assistance shall include preparation of meeting minutes and the development and dissemination of decision and other documents. The Executive Secretary of the NSC shall have custody of record copies of Findings and MONs as approved by the President. The DCI, other members of the NSPG and the head of such other Executive department, agency or entity the President may direct to undertake a special activity, shall be provided with a copy of each Finding and MON as signed by the President, together with the National Security Advisor's memorandum recording the President's decision.

E. Conduct of Special Activities

Absent a specific presidential decision, as provided in section 1.8(e) of Executive Order 12333, that another Executive department, agency or entity is more likely to achieve a particular objective, no department, agency or entity other than the CIA shall be responsible as lead agency for the conduct of a special activity. Private individuals and organizations used in the conduct of special activities shall be subject to observation and supervision, as appropriate in the interests of proper

established for such purpose by the CIA, or other Executive department, agency, or entity.

F. Restricted Consideration

1. Security

The National Security Advisor shall establish a separate, specially compartmented control and access system at the Top Secret classification level for all policy matters concerning special activities...

G. Congressional Notification

1. The Requirement to Notify Congress

Consistent with section 501 of the National Security Act of 1947, as amended (50 U.S.C. 413), and unless the President otherwise directs in writing pursuant to his constitutional authorities and duties, Congress shall be notified on the President's behalf of all special activities in accordance with this Directive.

2. Contents of Notification

In all cases, notification to Congress as provided herein shall include a copy of the Finding or associated MON, if any, as signed by the President, and the statement described in section II.A.3 hereof.

3. Prior Notification

Consistent with the expectation of prior notification to Congress, in all but extraordinary circumstances as specified herein, the DCI, or head of such other Executive department, agency, or entity authorized to conduct a special activity, shall notify Congress, on the President's behalf, through the Select Committee on Intelligence of the Senate and the Permanent Select Committee on Intelligence of the House of Representatives (hereinafter collectively referred to as the "Intelligence Committees"), prior to initiation of each special activity authorized by a Finding and associated MON, if any. In extraordinary circumstances affecting the vital interests of the United States, the DCI, or head of such other Executive department, agency, or entity authorized to conduct a special activity, shall notify Congress, on the President's behalf, through the Majority and Minority Leaders of the Senate, the Speaker and Minority Leader of the House of Representatives, and the Chairman and Vice Chairman of the Senate Select Committee on Intelligence, and the Chairman and Ranking Minority Member of the Permanent Select Committee on Intelligence of the House of Representatives, prior to initiation of a special activity authorized by a Finding and associated MON, if any.

4. Extraordinary Circumstances

If the President determines that it is necessary, in order to meet rare, extraordinary circumstances, to delay notification until after the initiation of a special activity, the DCI, or head of such other Executive department, agency, or entity authorized to conduct a special activity, shall delay notification consistent with section 501(b) at the direction of the President. Unless the President otherwise directs, not later than two working days after the President signs a Finding or associated MON, if any, the Intelligence Committees shall be notified in accordance with established procedures. In all such cases, notification shall include the reasons for not giving prior notice to the Intelligence Committees. In the event the President directs that notification to Congress be delayed beyond two working days after presidential authorization of a special activity as provided herein, the grounds for such delay shall be memorialized in writing and shall be re-evaluated by the NSPG not less frequently than every ten (10) days.

III. SPECIAL ACTIVITIES NOT CONDUCTED BY THE CIA

If, as provided in section 1.8(e) of Executive Order No. 12333, the President directs that an Executive department, agency or entity other than the CIA conduct a special activity, the provisions of this Directive shall apply to such department, agency, or entity. In such cases, the head of such other Executive department, agency or entity shall fully and currently inform the DCI of all aspects of the special activity, and jointly with the DCI shall notify Congress of the special activity, in accordance with the DCI's role as the President's principal advisor on intelligence matters as set forth in NSDD 266.

**U.S. Department of Justice**

Office of Legislative Affairs

Office of the Assistant Attorney General

*Washington, D.C. 20530*

21 June 1988

Honorable Dante B. Fascell
Chairman
Committee on Foreign Affairs
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter presents the views of the Department of Justice on H.R. 3822, a bill relating to the system of congressional oversight of intelligence activities. The Department of Justice opposes enactment of this legislation because we believe it would unconstitutionally intrude on the President's authority to conduct the foreign relations of the United States.

H.R. 3822 would repeal the Hughes-Ryan Amendment, and substantially revise the congressional reporting requirements of the National Security Act. Besides appearing to broaden the congressional notification requirements, section 3 of H.R. 3822 would delete from section 501(a) of the National Security Act the present express acknowledgment that the Act imposes reporting requirements on the President only insofar as the requirements are consistent with his authorities and duties under the United States Constitution.[1] It would also delete the Act's provision

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[1] Section 501(a) presently provides (emphasis added):

> To the extent consistent with all applicable authorities and duties, <u>including those conferred by the Constitution upon the executive and legislative branches of the Government</u>, and to the extent consistent with due regard for the protection from unauthorized disclosure of classified information and information relating to intelligence sources and methods, the Director of Central Intelligence and the heads of all departments, agencies, and other entities of the United States involved in intelligence activities shall --
>
> (1) keep the Select Committee on Intelligence of

(continued...)

acknowledging the President's independent constitutional authority, namely section 501(b), which provides for presidential discretion in deferring notice to Congress concerning exceptionally sensitive intelligence activities.[2] In place of the current Act's provision acknowledging the President's authority to provide "timely notice" in such sensitive situations, section 3 of H.R. 3822 would purport to require that such notice be given within 48 hours after the initiation of such operations.

In keeping with the long-standing view of Presidents of every Administration that has considered this issue, the Department believes that these provisions of H.R. 3822 are unconstitutional. As you know, these same issues were the subject of thorough debate and extensive negotiation in 1980, when Congress was considering proposals for intelligence oversight legislation. It was the position of the Administration

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[1](...continued)
the Senate and the Permanent Select Committee on Intelligence of the House of Representatives . . . fully and currently informed of all intelligence activities which are the responsibility of, are engaged in by, or are carried out for or on behalf of, any department, agency, or entity of the United States, including any significant anticipated intelligence activity, except that (A) the foregoing provision shall not require approval of the intelligence committees as a condition precedent to the initiation of any such anticipated intelligence activity, and (B) if the President determines it is essential to limit prior notice to meet extraordinary circumstances affecting vital interests of the United States, such notice shall be limited to the chairman and ranking minority members of the intelligence committees, the Speaker and minority leader of the House of Representatives, and the majority and minority leaders of the Senate.

Needless to say, deleting the underscored language would be only symbolic and could not alter the constitutional rights or duties of either branch.

[2] Section 501(b) currently provides (emphasis added):

The President shall fully inform the intelligence committees <u>in a timely fashion</u> of intelligence operations in foreign countries, other than activities intended solely for obtaining necessary intelligence, for which prior notice was not given under subsection (a) of this section and shall provide a statement of the reasons for not giving prior notice.

then, as it is of this Administration now, that there may be exceptional occasions on which the President's exclusive and inalienable constitutional duties in the area of foreign affairs would preclude him from giving prior notice of very sensitive intelligence-related operations.

This Administration, like prior Administrations, is eager to work with Congress in devising arrangements to satisfy the legitimate interests in legislative oversight. But the executive branch in 1980 recognized that there is a point beyond which the Constitution simply would not permit congressional encumbering of the President's ability to initiate, direct, and control the sensitive national security activities at issue here. Testifying before the Senate Select Committee in 1980, then CIA Director Stansfield Turner emphatically pointed out that the prior notification then being considered "would amount to excessive intrusion by the Congress into the President's exercise of his powers under the Constitution." See National Intelligence Act of 1980: Hearings before the Senate Select Committee on Intelligence, 96th Cong., 2d Sess. 17 (1980).

The Constitution confers on the President the authority and duty to conduct the foreign relations of the United States. Covert intelligence-related operations in foreign countries are among the most sensitive and vital aspects of this duty, and they lie at the very core of the President's Article II responsibilities. In this letter the Department will not seek to detail all the authorities and precedents relevant to our conclusion that an absolute prior notice requirement of the kind proposed in H.R. 3822 would be unconstitutional. In summary, however, the Department believes that the Constitution, as confirmed by historical practice and clear statements of the United States Supreme Court, leaves the conduct of foreign relations, which must include foreign intelligence operations, to the President except insofar as the Constitution gives specific tasks to the Congress.

The principal source for the President's wide and inherent discretion to act for the nation in foreign affairs is section 1 of article II of the Constitution wherein it is stated: "The executive Power shall be vested in a President of the United States of America." The clause has long been held to confer on the President plenary authority to represent the United States and to pursue its interests outside the borders of the country, subject only to limits specifically set forth in the Constitution itself and to such statutory limitations as the Constitution permits Congress to impose by exercising one of its enumerated powers. The President's executive power includes all the discretion traditionally available to any sovereign in its external relations, except insofar as the Constitution places that discretion in another branch of the government.

Before the Constitution was ratified, Alexander Hamilton explained in The Federalist why the President's executive power would include the conduct of foreign policy: "The essence of the legislative authority is to enact laws, or, in other words to prescribe rules for the regulation of the society; while the execution of the laws and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate." See The Federalist No. 75, at 450 (A. Hamilton) (C. Rossiter ed. 1961). By recognizing this fundamental distinction between "prescribing rules for the regulation of the society" and "employing the common strength for the common defense" the Framers made clear that the Constitution gave to Congress only those powers in the area of foreign affairs that directly involve the exercise of legal authority over American citizens. As to other matters in which the nation acts as a sovereign entity in relation to outsiders, the Constitution delegates the necessary authority to the President in the form of the "executive Power."

The authority of the President to conduct foreign relations was first asserted by George Washington and acknowledged by the First Congress. Without consulting Congress, President Washington determined that the United States would remain neutral in the war between France and Great Britain. The Supreme Court and Congress, too, have recognized the President's broad discretion to act on his own initiative in the field of foreign affairs. In the leading case, United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), the Court drew a sharp distinction between the President's relatively limited inherent powers to act in the domestic sphere and his far-reaching discretion to act on his own authority in managing the external relations of the country. The Supreme Court emphatically declared that this discretion derives from the Constitution itself, stating that "the President [is] the sole organ of the federal government in the field of international relations -- a power which does not require as a basis for its exercise an act of Congress." 299 U.S. at 319-320 (emphasis added). Moreover, as the Curtiss-Wright Court noted, the Senate Committee on Foreign Relations acknowledged this principle at an early date in our history, stating that "the President is the constitutional representative of the United States with regard to foreign nations." The Committee also noted "that [the President's constitutional] responsibility is the surest pledge for the faithful discharge of his duty" and the Committee believed that "interference of the Senate in the direction of foreign negotiations [is] calculated to diminish that responsibility and thereby to impair the best security for the national safety." 299 U.S. at 319 (quoting U.S. Senate, Reports, Committee on Foreign Relations, vol. 8, p. 24 (Feb. 15, 1816)). Curtiss-Wright thus confirms the President's inherent Article II authority to engage in a wide range of extraterritorial foreign policy initiatives, including intelligence activities -- an

authority that derives from the Constitution, not from the passage of specific authorizing legislation.

Despite this wide-ranging authority, Presidents have been careful to consult regularly with Congress to seek support and counsel in matters of foreign affairs. Moreover, we recognize that the President's authority over foreign policy, precisely because its nature requires that it be wide and relatively unconfined by preexisting constraints, is inevitably somewhat ill-defined at the margins. Whatever questions may arise at the outer reaches of his power, however, the conduct of secret negotiations and intelligence operations lies at the very heart of the President's executive power. The Supreme Court's Curtiss-Wright decision itself notes the President's exclusive power to negotiate on behalf of the United States. The Supreme Court has also, and more recently, emphasized that this core presidential function is by no means limited to matters directly involving treaties. In United States v. Nixon, 418 U.S. 683 (1974), the Court invoked the basic Curtiss-Wright distinction between the domestic and international context to explain its rejection of President Nixon's claim of an absolute privilege of confidentiality for all communications between him and his advisors. While rejecting this sweeping and undifferentiated claim of executive privilege as applied to communications involving domestic affairs, the Court repeatedly and emphatically stressed that military or diplomatic secrets are in a different category: such secrets are intimately linked to the President's Article II duties, where the "courts have traditionally shown the utmost deference to Presidential responsibilities." 418 U.S. at 710 (emphasis added).

We are unaware of any provision of the Constitution that affirmatively authorizes Congress to have the role provided in H.R. 3822. Congress' implied authority to oversee the activities of executive branch agencies is grounded on Congress' need for information to consider and enact needful and appropriate legislation. Congress in the performance of this legislative function, however, does not require detailed knowledge of virtually all intelligence activities particularly prior to initiation. Oversight of ongoing operations has the potential to interfere with the ability of the President to discharge the duties imposed on him by the Constitution. Accordingly, the President must retain his constitutional discretion to decide whether prior notice, in certain exceptional circumstances, is not appropriate.

Since the current legislation was adopted in 1980, of course, the President has provided prior notice of covert operations in virtually every case. Moreover, in acting to implement the recommendations of the Tower Board, the President recently reaffirmed his commitment to the current statutory scheme of notification. See the text of National Security

Decision Directive No. 266, which accompanied the President's message to Congress of March 31, 1987.

There are two other provisions of H.R. 3822 which raise similar constitutional problems. Proposed Section 502 would require that intelligence agencies disclose to Congress whatever information concerning intelligence activities, other than "special activities," that Congress deems necessary to fulfill its responsibilities. Proposed Section 503 has a similar provision requiring the Executive branch to disclose all information concerning special activities that is requested by the intelligence committees. These virtually absolute disclosure requirements raise much the same concern as the 48-hour notice provision. Both purport to sharply reduce the authority of the Executive branch to withhold from Congress information relating to the discharge of its responsibilities in the field of foreign affairs, even when the release of such information would interfere with the President's ability to fulfill his constitutional duties.

The provisions of H.R. 3822 requiring that the President provide all information requested by the intelligence committees raise a separate constitutional concern. Many of the documents retained by the intelligence agencies may constitute interagency communications. Although disclosure of these documents might not impair directly the President's authority in the area of foreign affairs, we nevertheless believe that the Executive branch may legitimately refuse to provide these documents to Congress. The Supreme Court in the Nixon case recognized that there is a "valid need for protection of communications between high government officials and those who advise and assist them." 418 U.S. at 705. While this decision was rendered in the context of Presidential communications, the same principles would apply with respect to communications containing the policy deliberations of other executive officials. The need to protect deliberative communications derives from the need for candor and objectivity in the policymaking decision of the government.

Of course, the Executive branch will attempt to cooperate with Congress. In all but the most exigent circumstances, this cooperation will take the form of providing the information that Congress requests. We cannot agree, however, that a blanket requirement of disclosure in all cases in appropriate. The President must retain the discretion to withhold information when its disclosure would impair his ability to fulfill his own constitutional responsibilities.

In closing, the Department notes that when proposals similar to those in H.R. 3822 were introduced in 1979 and 1980, it was recognized that no President has either the right or the power to alter the Constitution's allocation of powers among the

institutions of our government. This view was correct then and is correct now.

In light of our constitutional concerns, in the absence of amendments responsive to the constitutional issues, we would recommend to the President that he disapprove the proposed legislation.

The Office of Management and Budget has advised this Department that it has no objection to the submission of this report to Congress, and that enactment of H.R. 3822 would not be in accord with the President's program.

Sincerely,

Thomas M. Boyd
Acting Assistant Attorney General

Amendment to the Substitute for H.R. 3822
Offered by Mr. Solomon

Page 10, after line 24, insert the following:

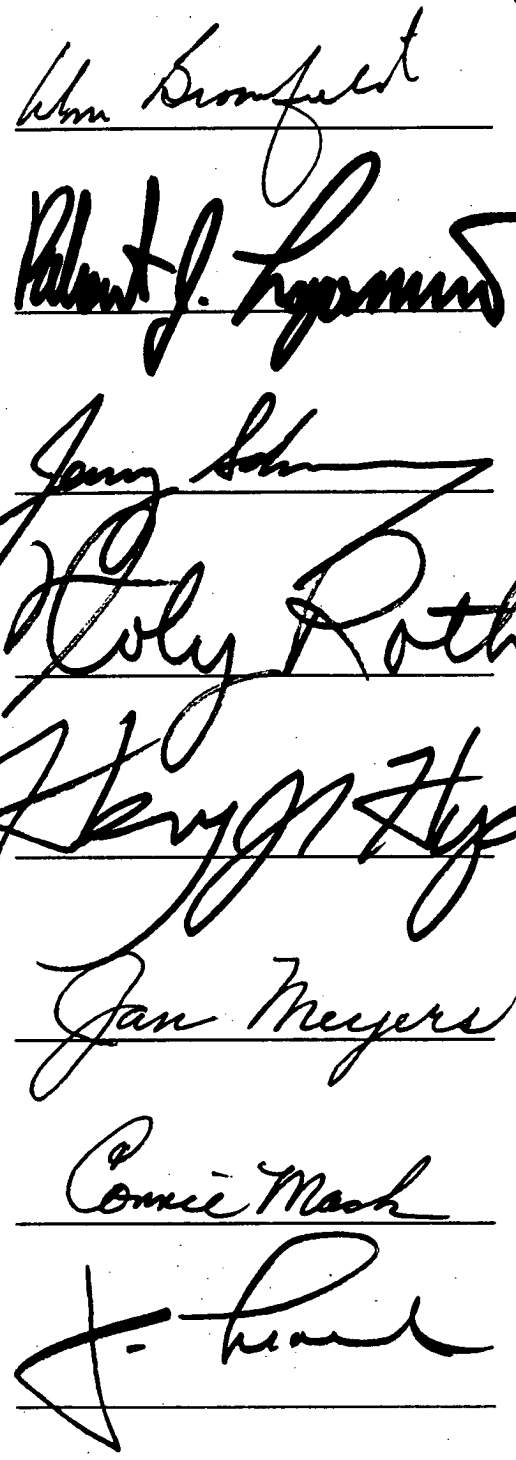
UNAUTHORIZED DISCLOSURE OF CLASSIFIED INFORMATION

Sec. 6. Title V of the National Security Act of 1947 (50 USC 413, et seq.) is amended by adding at the end thereof the following new section:

"UNAUTHORIZED DISCLOSURE OF CLASSIFIED INFORMATION

"Sec. 506. Any person who, being or having been an officer or employee of the United States or a person otherwise having had authorized access to classified information produced as a result of the provisions of this title, knowingly and willfully discloses the substance of that information to an individual who is not authorized to receive it, except with the authorization of the President or pursuant to the applicable rules of a House of Congress of which that person is a Member, officer or employee, shall be fined not less than $1,000 nor more than $20,000 or imprisoned for not less than ninety days nor more than five years, or both.".

~~Signature Sheet~~
~~Dissenting Views, H.R. 3026~~



Next 3 Page(s) In Document Denied

5 July 1988

JUDGE:

RE: Your proposed remarks at breakfast with the
House Committtee on Foreign Affairs
7 July 1988 8:30 a.m.
2200 Rayburn House Office Building

You are scheduled to have breakfast with the members and staff of the House Foreign Affairs Committee (HFAC). At the request of the Office of Congressional Affairs, we have prepared unclassified talking points and background information for you. The talking points are unclassified because staffers holding no clearances may be present at the breakfast. Dick Kerr's staff has provided unclassified updates on key world hotspots that are also attached.

The breakfast will be held in the Committee's hearing room, 2200 Rayburn House Office Building. Because the breakfast follows the Fourth of July holiday, attendance is hard to estimate. It is possible that as many as 50 congressmen and staff may attend. John Helgerson and [redacted] of OCA will accompany you. The House Foreign Affairs Committee regularly has breakfast meetings with Cabinet members, visiting heads of state, and other high-level officials to informally discuss matters of mutual interest. STAT

This will be your second dealing with HFAC. On 14 June you testified before the full committee on H.R. 3822, the Intelligence Oversight Act of 1988. Your testimony covered the general merits of such legislation and specifically addressed the bill's proposal that the President notify Congress within 48 hours of authorizing a covert action. Because this was your first appearance before HFAC, you also addressed the committee's access to intelligence information and the role of covert action in U.S. foreign policy. Following your testimony, you entertained questions on the congressional oversight process, including the constitutionality and practicality of 48-hour notification, the risk of unauthorized disclosures due to congressional notification, and the bill's definition of covert action. STAT

You may be asked to make some brief remarks at the upcoming breakfast.

[redacted] STAT

Bill Baker

Attachments:
As Stated

STAT



Next 18 Page(s) In Document Denied